

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 July 2004

BALCA Case No.: 2003-INA-206
ETA Case No.: P2000-CA-09509730/ML

In the Matter of:

MELMARS GUEST HOME,
Employer,

on behalf of

JOSETTE BALMACEDA,
Alien.

Appearances: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Nurse Assistant.¹ The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On June 19, 2000, the Employer, Melmars Guest Home, filed an application for labor certification to enable the Alien, Josette D. Balmaceda, to fill the position of "Household Domestic Worker/Caregiver." (AF 71). The job was classified by the Job Service as "Nurse Assistant." The job duties included cleaning patients' rooms, laundry, preparing and serving meals, as well as caring for the patients and assisting with personal hygiene, including bathing. The position required four years of high school and three months of experience in the job offered. The hours for the position were 6-9 a.m. and 3-9 p.m., with overtime as needed. The Employer also required that the applicant live on the premises and be on-call twenty-four hours per day.

On November 7, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification for several reasons.² (AF 65-69). The CO found that the position was one which was on the Schedule B list of non-certifiable occupations and therefore, the Employer needed to petition for a Schedule B waiver, document that it had had a suppressed job order on file with the local office for a period of thirty calendar days and that it was not able to obtain a qualified U.S. worker. The CO questioned whether the Alien had the three months of experience required of U.S. applicants prior to hire, as the application did not indicate this experience. The Employer needed either to amend the ETA 750B, to delete the requirement, or to document how it was now not feasible to hire workers with less training or experience than that required in the job offer. Finally, the CO found that the position combined the duties of multiple occupations: general houseworker, launderer/cook and nurse assistant. The Employer was directed to amend the restrictive requirement or to justify the requirement as business necessity. (AF 66-68).

The Employer submitted rebuttal on January 16, 2003. (AF 9-64). Included were numerous documents, including a petition for a Schedule B waiver, a statement regarding the Alien's work experience and a justification for the combination of duties. The

² Those issues which were successfully rebutted will not be detailed herein.

Employer stated that it was advised by the Employment Development Department (“EDD”) that every request for labor certification is automatically processed for “suppressed CALJOBS order.” (AF 28). Employment verification for the Alien indicated that from January 2000 to April 2000, she was a live-in worker, taking care of an 88 year old woman with Alzheimer's disease. The duties performed in that position included caring for the patient, assisting with personal hygiene, and cleaning, as well as laundry and food preparation. (AF 29).

The Employer argued that the combination of duties was necessary because the developmentally-disabled residents who lived in the care home needed someone to take care of all their activities of daily living. The Employer explained that a second worker was not necessary because the household duties comprised only 25% of the total number of hours of employment. A part-time worker could not be used because the residents needed consistency in care by a known caregiver or nurse assistant. According to the Employer, this combination of duties was a customary business practice in the community. (AF 31-32). The Employer indicated that it was willing to delete the restrictive requirement, and to retest the labor market, changing the hours worked, deleting the house cleaning, laundry duties, waking up for toilet needs, and the knowledge of food nutrition, preparation, storage and menu planning, as well as the requirement that the applicant be on-call twenty-four hours per day. However, the proposed advertisement submitted indicated that the worker would wash dishes, straighten rooms, and serve meals. (AF 42).

A Final Determination (“FD”) was issued on February 13, 2003. (AF 7-8). The CO found that the issue of the Schedule B occupation had not been rebutted, as the job order the Employer ran from September 6, 2000 to October 6, 2000 was unsuppressed, or without any way to account for responses from available U.S. workers. The previous job order did not qualify the petition for waiver from Schedule B and the Employer had taken no action to rectify that situation in response to the NOF.

The CO also found that the rebuttal failed to establish that the Alien had three

months of experience in the important job duties. While the Employer had provided an updated statement of the Alien's background, the CO noted that it failed to indicate that the Alien had experience in "behavioral problems, self-destructive, violent, aggressive, verbally-abusive, handicapped, wheelchair bound, disabled and other ailments...[h]elp those with walkers, canes and wheelchair bound residents with their needs." (AF 8). Therefore, the Alien was hired without the necessary qualifications and U.S. applicants were being held to a much higher standard.

With regard to the combination of duties, the CO noted that although the Employer argued that the houseworker duties were a minor portion of the job, it failed to delete that duty or any of the other duties at issue. While the Employer included advertisements supposedly showing other jobs with a combination of duties, the CO noted that they did not establish a common industry practice of the combined job duties.³

On March 14, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on May 23, 2003. (AF 1-6). With its request for review, the Employer has submitted new information and documentation, including an amended Employment Verification for the Alien. With regard to the Alien's qualifications, the Employer provided documentation detailing the Alien's employment to show that she met the three month experience requirement. (AF 6). The Employer further indicated its willingness to re-advertise and retest the labor market. (AF 1-2). With regard to the combination of duties, the Employer submitted a draft advertisement and confirmed its willingness to retest the labor market. (AF 4).

DISCUSSION

The Board's review of the denial of certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board

³ The newspaper advertisements are not in the record, however, given that this matter is being decided on another issue, the error is harmless.

does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*).

The CO properly raised the issue of the Alien's experience, given that the Employer required three months of experience from U.S. applicants, yet the application indicated that the Alien had none prior to hire. By way of rebuttal, the Employer submitted a statement from the Alien which indicated experience caring for one elderly woman. This position did not include all of the significant job duties for this position, specifically experience caring for developmentally-disabled, verbally-abusive, handicapped and/or wheelchair-bound patients. Therefore, the Employer failed to document that the Alien had the actual minimum requirements prior to hire, which U.S. applicants were required to have.

Twenty C.F.R. § 656.21(b)(5) requires an employer to document that its requirements for the job opportunity represent the employer's actual minimum requirements for that job, and that employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience. An employer violates 20 C.F.R. § 656.21(b)(5) if it hires an alien with lower qualifications than it is now requiring and has not documented that it is infeasible to hire a U.S. worker without that training or experience. *Keithley Instruments, Inc.*, 1987-INA-717 (Dec. 19, 1988) (*en banc*). The Employer has done just that, and its offer to cure, as made in its request for review, is not timely. The offer to cure made in the rebuttal did not actually cure the defect, as the draft advertisement still contained the duties that were at issue. As such, labor certification was properly denied and the remaining issues need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.